

APPENDIX B: RULING

LYN/DOT/eap 3/28/2002

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

California ISP Association, Inc.,

Complainant,

v.

Pacific Bell Telephone Company (U-1001-C); SBC
Advanced Solutions, Inc. (U-6346-C) and
Does 1-20,

Defendants.

Case 01-07-027
(Filed July 26, 2001)

ASSIGNED COMMISSIONER'S AND ADMINISTRATIVE LAW JUDGE'S RULING DENYING DEFENDANTS' MOTION TO DISMISS

1. Summary

This ruling denies the motion to dismiss filed by Pacific Bell Telephone Company (Pacific) and SBC Advanced Solutions Inc. (ASI) (jointly "Defendants"). A prehearing conference (PHC) to set a schedule and scope for this matter is scheduled for April 25, 2002.

2. Motion to Dismiss

On July 26, 2001, the California ISP Association (CISPA, or "Complainant") filed a complaint against Pacific and ASI. The complaint alleges unlawful discrimination by Pacific and ASI in the provision of digital subscriber line (DSL)

transport services in California. CISPA alleges that this conduct violates the Public Utilities Code and Commission orders.

On October 22, 2001, Defendants jointly filed a motion to dismiss the complaint on jurisdictional and mootness grounds. They allege that the Commission does not have jurisdiction over the DSL Transport services at the heart of the complaint because those services are interstate services within the jurisdiction of the Federal Communications Commission (FCC). They rely on FCC orders purportedly finding DSL Transport service to be jurisdictionally interstate and properly tariffed at the federal level.¹ Although the FCC found DSL services can have intrastate components which are properly tariffed at the state level (*Id.*, para. 27), Defendants contend that because CISPA's complaint focuses on DSL Transport used by internet service providers (ISPs) to connect to the Internet rather than a Local Area Network (LAN), the service is a matter of exclusive federal jurisdiction. In addition, Defendants maintain that the complaint should be dismissed as moot given ASI's filing of an interstate tariff with the FCC for DSL Transport Service in California. Defendants explain that ASI initially provided DSL Transport Service to ISPs in California pursuant to a written agreement (the "DSL Transport Contract"), but that ASI no longer requires ISPs to execute the DSL Transport Contract. Defendants conclude that those parts of the complaint concerned with implementation of the contract are now moot in light of the FCC tariff.

¹ See *In the Matter of GTE Telephone Operating Cos.*, CC Docket No. 98-79, *Memorandum Opinion and Order* ("GTE Order"), FCC 98-292 (rel. October 30, 1998), para. 16, and *In the Matter of Bell Atlantic Telephone Cos., et al.*, CC Docket No. 98-103, *Memorandum Opinion and Order*, FCC 98-317 (rel. November 30, 1998).

In response to the motion, CISPA disagrees with the notion that the Commission does not have jurisdiction to hear the complaint and that ASI's FCC tariff moots the complaint.

First, CISPA responds that the filing of a tariff with the FCC for DSL Transport service does not make ASI immune from state jurisdiction, particularly for conduct prior to the tariff filing or conduct outside the scope of the tariff.² In particular, CISPA alleges that conduct such as preferential treatment of SBC-affiliated ISPs, discrimination against independent (or non-SBC affiliated) ISPs, improper sharing of customer information, and a host of service quality concerns all merit consideration by the Commission and fall outside the scope of the federal tariff. CISPA asks the Commission to enjoin allegedly illegal and anticompetitive marketing and sales practices, which it argues are outside the scope of the FCC tariff. CISPA contends that these actions either lead to Defendants stealing customers from independent ISPs, or unlawfully retaining, or "clenching," them with affiliated ISPs through misleading information.

Second, CISPA disputes Defendants' interpretation of the FCC's 1998 GTE Order. CISPA asserts that the Commission and the FCC have "concurrent jurisdiction" over the service. According to CISPA, in order to displace state regulation, congressional intent must be "clear and manifest." *See Jones v. Rath Packing*, 430 U.S. 519, 525 (1977). Similarly, federal preemption of state telecommunications regulation "must be clear and occurs only in limited circumstances." *See Communications Systems International v. the California Public*

² ASI acknowledged at a prehearing conference on 12/6/01 that it has asked the FCC to treat it as a non-dominant carrier, which would result in federal detariffing of ASI's DSL Transport services. (Transcript PHC-2 (Tr.) at 55-56.)

Utilities Commission, 196 F.3d 1011, 1017 (9th Cir. 1999). CISPA claims that the FCC's requirement that carriers file a federal tariff for DSL service does not translate into a complete preemption of state authority over DSL services. CISPA asserts that federal courts have rejected the "end-to-end analysis" used by the FCC to suggest that communications between ISPs and their customers are interstate. Therefore, Defendants cannot rely on this analysis to effect a "clear and manifest" preemption of Commission authority.

Moreover, CISPA contends that Congress left substantial regulatory authority to the states in the Telecommunications Act of 1996 (the Act) so long as state regulations do not conflict with the Act. Complainant cites *MCI Telecommunications Corp. v. U.S. West Communications*, 204 F.3d 1262, 1265 (9th Cir. 2001) as holding that while the FCC is charged with promulgating regulations to implement the Telecommunications Act, "the Act reserves to states the ability to impose additional requirements that are consistent with the Act and 'further competition.'" CISPA notes that Section 253(b) of the Act does not affect the ability of the state to impose requirements to protect public safety and welfare, and safeguard the rights of consumers. 47 U.S.C. Section 253(b). CISPA finds support for this contention in *Communications Telesystems* wherein the court upheld the Commission's authority under 253(b) to suspend a company for "slamming," 196 F.3d at 1017. Given that the gravamen of the complaint concerns sales and marketing practices, alleged anticompetitive conduct, and service quality, CISPA contends that the Commission is well within its authority to entertain these consumer rights issues.

CISPA provides two further examples to contradict Defendants' claim that state regulation is preempted. First, CISPA notes that the FCC's 1999 "Line

Sharing” order expressly invited state regulation of DSL Transport,³ and that the Commission subsequently approved a DSL line sharing arrangement.

(D.00-09-074.) Second, CISPA documented one occasion where the FCC’s Consumer Information Bureau directed a written complaint regarding DSL service to this Commission for action.⁴

Finally, CISPA maintains that the savings clause of Section 414 of the Act allows states to enforce their own laws as to activities involving interstate communications, so long as the state regulation does not seek to modify the terms of the relevant federal tariff.⁵ CISPA contends that federal courts have made clear that the filing of a federal tariff does not foreclose state law claims based on misrepresentations and improper use or disclosure of customer information, as Complainants contend here. *See In re Long Distance Telecommunications Litig.*, 831 F.2d 627 (6th Cir. 1987); *Crump v. Worldcom, Inc.*, 128 F.Supp.2d 549 (W.D. Tenn. 2001); *A.S.I. Worldwide Communications Corp. v. Worldcom, Inc.*, 115 F.Supp.2d 201 (N.H. 2000).

In reply to CISPA’s assertions, Defendants reiterate their argument that the Commission does not have jurisdiction over interstate services such as DSL

³ *In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 98-147; CC Docket No. 96-98, FCC 99-355, (rel. December 9, 1999), para. 159.

⁴ See CISPA’s Supplement to PHC Statement, 12/4/01, Exhibit A.

⁵ Section 414 states:

Nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies. (47 U.S.C. 414)

Transport and that the notion of “concurrent” jurisdiction is faulty. Defendants cite *Ivy Broadcasting Co. v. American Tel & Tel. Co.*, 391 F.2d 486 (2nd Cir. 1968) and *McDermott v. Western Union Tel. Co.*, 746 F.Supp. 1016 (S.D. Cal. 1990) to support the assertion that states are precluded from exercising jurisdiction over interstate services. Defendants also note the Commission’s own statements in *Re McCaw Cellular Communications, Inc.*, 49 CPUC 2d 449, 451 (May 19, 1993) that it does not regulate interstate services. Defendants contend that where the FCC has declared a service “interstate,” it has only allowed a state commission to regulate with explicit permission. Defendants also claim that none of the cases relied upon by Complainants, which involve reciprocal compensation and whether calls to ISPs are interstate or local, alter the FCC’s finding that DSL transport, which is a digital rather than a dial-up service, is jurisdictionally interstate. Further, Defendants attempt to distinguish CISPA’s legal citations to cases that support the idea of “concurrent jurisdiction.”

3. Discussion

There is no question that the FCC’s GTE Order found DSL Transport to be interstate in nature. There is also no question that DSL Transport can involve certain intrastate applications. Both CISPA and Defendants describe intrastate DSL applications, such as remote digital access to a corporate local area network (LAN). (Tr. at 40-41 and 52) Upon review of the FCC’s 1998 GTE Order and the numerous legal citations provided by both parties, we find that the Commission has concurrent jurisdiction with the FCC over DSL Transport service, as set forth below, for several reasons.⁶ First, the FCC has not explicitly barred all state

⁶ We note that the FCC issued a Notice of Proposed Rulemaking (NPRM) in February 2002, which tentatively classifies wireline broadband Internet access services, such as

Footnote continued on next page

regulation. Nothing in the FCC's 1998 GTE order says the PUC cannot exercise jurisdiction over certain aspects of DSL Transport service.

Second, we find CISPA's citations to caselaw requiring "clear and manifest" intent to preempt state authority more relevant than the citations provided by Defendants. While Defendants rely on *Ivy Broadcasting* and *McDermott* to support their preemption claims, both of these cases are called into question by later court determinations stating these cases are inconsistent with the Supreme Court's modern preemption jurisprudence requiring "clearly manifest intention to broadly preempt all state law" and that they failed to consider the effect of the federal savings clause in Section 414 of the Act.⁷ *A.S.I. Worldwide v. Worldcom*, 115 F.Supp.2d at 207; *See also Heichman v. American Tel. and Tel. Co.*, 943 F. Supp. 1212, 1220 (C.D. Cal. 1995) ("the Ivy Broadcasting court did not address the savings clause" and in *McDermott* "there was no issue regarding complete preemption"); *Crump v. Worldcom, Inc.*, 128 F.Supp.2d at 554 ("circumstances where federal law completely preempts state law, so as to

DSL, as "information services." (See *In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities and Universal Service Obligations of Broadband Providers*, CC Docket No. 02-33, *Computer III Further Remand Proceedings*, CC Docket Nos. 95-20, 98-10, FCC 02-42 (Rel. February 14, 2002), para. 17.) The issuance of the NPRM and adoption of tentative conclusions regarding DSL services does not alter the conclusions in this ruling.

⁷ Both *Ivy* and *McDermott* concerned whether a complaint filed in state court, could be removed to federal court under the "complete preemption" doctrine. That doctrine applies when Congress has "so completely pre-empted a particular area that any civil complaint raising this select group of claims is necessarily federal in character" and cannot be entertained in state court. *Crump*, 128 F.Supp. 2d at 554. The complete preemption doctrine is not synonymous with "field" preemption. The FCC itself has not asserted that it has occupied the field of DSL service, instead acknowledging that states may regulate certain types of DSL Transport services.

support removal of a state-law claim to federal court, are extremely rare.”) Reliance on the cases cited by CISPA is not inappropriate, as Defendants suggest, because all three cases involve a claim of federal preemption of interstate telecommunications services.⁸

Under the reasoning provided by these cases, we find that Defendants have not proven “clear and manifest” congressional intent to preempt all state authority, given the savings clause in Section 414 and the provisions of Section 253(b) regarding safeguarding the rights of consumers.⁹ We find support for CISPA’s argument that the savings clause of Section 414 allows states to exercise

⁸ This reasoning is further supported by *Quayle v. MCI Worldcom, Inc.* (N.D. Cal. Oct 22, 2001)(2001 U.S. Dist. LEXIS 17450), which denied removal of a case filed in state court to federal court based on “complete preemption” arguments. *Quayle* states in relevant part:

Unfortunately for Defendant's position, neither the Ninth Circuit nor the Supreme Court has found the requisite Congressional intent in the FCA.” (*Id.*, *8.);

...

Plaintiffs are not challenging an approved practice, nor are they contesting the reasonableness of an approved rate. Rather, they are suing over alleged misrepresentations and deceptive business practices that they interpret to be a breach of Defendant's obligation as represented in advertising and marketing materials. Thus unlike Marcus, Plaintiffs here are not asking the Court to interpret a federal law, because the practice of which they complain has not been sanctioned by the federal government; it has not achieved the force and effect of a federal statute. Rather, Plaintiffs' claims for breach of contract, and for fraudulent and deceptive business practices and unfair competition, arise under principles of state common-law and statute. (*Id.*, *13.)

⁹ Even ASI’s own counsel admitted he did not know whether the Commission was divested of jurisdiction regarding claims that Defendants defrauded its customers. (Tr. at 74.)

their traditional police powers to safeguard consumer health, safety and welfare and to enforce their own laws with regard to interstate services provided to California customers, particularly where the state laws address misrepresentations to consumers and other marketing practices. *See In re Long Distance Telecommunications Litigation*, 831 F.2d 627, 633-634 (6th Cir. 1987) (holding that state law claims for fraud and deceit are not preempted by the Communications Act and that the savings clause of the Communications Act gives plaintiffs the option of pursuing their remedy at common law.) Commission action to consider this complaint will not conflict with the federal tariff or other federal laws and regulations.

Third, Defendants' reference to *Re McCaw Cellular* wherein the Commission stated it does not have jurisdiction over interstate services is inapposite. The statements in *McCaw Cellular* can be construed to refer to rates for wireless service. While the Commission is preempted with regard to wireless rates and entry, federal law does not preempt state authority over the terms and conditions of wireless service. In addition, statements by a prior Commission do not bar a future Commission from considering claims of violations of the Public Utilities Code for a service that has both intrastate and interstate components, such as DSL Transport.

Fourth, we agree with CISPA that the end-to-end analysis relied on by the FCC in its 1998 GTE Order has been questioned by appellate courts as it pertains to reciprocal compensation, although there have been no appeals of the federal tariffing of DSL service. In other words, while the FCC's authority to require an interstate DSL tariff is unquestioned, the original rationale used by the FCC to require federal tariffing of DSL cannot necessarily be relied upon to support complete federal preemption of DSL Transport. We recognize that DSL

Transport is distinct from reciprocal compensation issues, but we are not persuaded to rely on the end-to-end analysis to support complete preemption of Commission jurisdiction over all aspects of DSL transport service. We find it more reasonable that the Commission has the authority to enforce California public utility law as it pertains to actions by carriers, such as ASI, that are certificated to operate in California, when such enforcement does not conflict with terms of the federally approved tariff or any federal regulations.

Pacific admits that DSL Transport can be provided on an intrastate basis. There is little question that the Commission has the authority to hear a complaint relating to the terms of intrastate DSL Transport. Despite the fact that few, if any, customers purchase DSL Transport from an intrastate tariff,¹⁰ we find no conflict with federal tariffs or the FCC's GTE Order in the Commission reviewing ASI's sales and marketing practices and other service quality issues with regard to DSL Transport.

Fifth, we agree with Complainant that the FCC's line sharing order expressly invited states to decide issues surrounding sharing of the local loop, and this local loop sharing directly relates to DSL Transport. We also find it interesting that the FCC referred a complaint on DSL to this Commission. These two examples tend to refute Defendants' claim that the FCC has asserted exclusive jurisdiction over all aspects of DSL service.

¹⁰ In response to questions raised at the prehearing conference on 12/6/01, ASI stated in a letter to the ALJ dated 2/6/02 that "there are presently no DSL Transport to ISP service customers served out of the California intrastate tariff." While a few ISPs were provided DSL Transport from ASI's intrastate tariff, "such customers have all been moved to ASI's interstate tariff...."

Therefore, we conclude that the Commission can consider CISPA's complaint alleging violations of California public utility law and Commission orders by Defendants. We reject Defendants' assertions that the Commission does not have jurisdiction to pursue claims of fraudulent or misleading conduct, or poor service quality relating to DSL service because the FCC has required a federal tariff for that service. We agree with Defendants, however, that the scope of the complaint should not include the reasonableness of DSL rates, operating speeds and the like set forth in the federal tariff provided with Defendants' answer to the complaint because that would require us to interpret and adjudicate the federal tariff which we decline to do in this proceeding. Indeed, CISPA has stated it does not seek to modify the terms of ASI's federal tariff.¹¹ Instead, the scope of the case should involve the interpretation and application of state law.

Specifically, this means that the scope of the complaint should be limited to some, but not all, of the issues raised by CISPA. The ALJ will convene a prehearing conference to discuss the scope of the case in more detail, as discussed below. Nevertheless, based on the complaint itself and CISPA's scoping remarks thus far, the Commission can consider allegations of Section 451 violations, including but not limited to issues surrounding service quality such as unreasonable service disruptions, limitations, or delays. The Commission can consider allegations of Section 453 violations including but not limited to alleged discriminatory treatment and unlawful business practices. The Commission may also consider alleged violations of Sections 2896 and 2891 relating to failure to

¹¹ CISPA response to motion to dismiss, 11/6/01, p. 4.

furnish adequate information and improper use of customer information, respectively. The Commission may consider whether Defendants have withdrawn benefits that were available to DSL Transport customers of Pacific Bell in violation of D.00-05-021.

We also find that the Commission may consider the conduct of ASI with regard to DSL Transport provisioning prior to the filing of the federal tariff.

For all the reasons stated above, we find that Defendants' motion to dismiss should be denied.

4. Prehearing Conference

A PHC is set for April 25, 2002 at 10 a.m. The PHC will be held in the Commission Courtroom, State Office Building, 505 Van Ness Avenue, San Francisco, California. The purpose of the PHC will be to discuss the scope and schedule for the case going forward.

Parties are directed to meet and confer to attempt to reach agreement on a scope and a schedule agreeable to all parties. Parties should report on the results of this effort in PHC statements that each party shall file and serve no later than April 17, 2002. The PHC statements should describe:

- Whether there are any changes to the scope of issues or witness lists that were previously set forth in PHC statements filed on November 27, 2001.
- A proposed schedule for the case including dates for service of prepared written testimony, reply testimony, hearing dates, and the estimated number of hearing days.

The PHC statements should be filed and served in paper form. In addition, the parties shall provide the assigned Administrative Law Judge and the office of the Assigned Commissioner with an electronic copy addressed to dot@cpuc.ca.gov and tj@cpuc.ca.gov no later than 5:00 p.m. on April 17, 2002.

IT IS RULED that:

1. The motion to dismiss filed by Pacific Bell Telephone Company and SBC Advanced Solutions Inc. is denied.
2. A prehearing conference (PHC) to discuss scope and schedule will be held on April 25, 2002 as set forth above.
3. Parties shall file PHC statements no later than April 17, 2002.

Dated March 28, 2002, at San Francisco, California.

/s/ LORETTA M. LYNCH
Loretta M. Lynch
Assigned Commissioner

/s/ DOROTHY J. DUDA
Dorothy J. Duda
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that I have by mail, and by electronic mail to the parties to which an electronic mail address has been provided, this day served a true copy of the original attached Assigned Commissioner's and Administrative Law Judge's Ruling Denying Defendants' Motion to Dismiss on all parties of record in this proceeding or their attorneys of record.

Dated March 28, 2002, at San Francisco, California.

/s/ ERLINDA PULMANO
Erlinda Pulmano

N O T I C E

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(END OF APPENDIX B)

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